

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 24, 2003

TO : Peter B. Hoffman, Regional Director
Region 34

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Yale University and Yale
New Haven Hospital
Cases 34-CA-10404, et al.

This case was resubmitted for advice concerning the Charging Parties' request for reconsideration of our prior conclusion that Yale-New Haven Hospital (the Hospital) lawfully denied access to and/or arrested certain offsite employees of Yale University (the University) who were handbilling on Hospital property.¹ For the reasons stated below, we reaffirm the conclusion in our prior advice memorandum. Accordingly, the Region should dismiss the pertinent charge allegations, absent withdrawal.

I. The offsite University employee handbillers' right to access the Hospital's property was governed by Babcock & Wilcox² principles rather than Republic Aviation³ principles.

The handbillers at issue here - University graduate students and/or employees - sought access to Hospital-owned entrances to the New Haven Unit (NHU), a complex where both University and Hospital employees worked. The handbillers did not work regularly and exclusively within the NHU. Their intended audience consisted of Local 34 members employed by the University and working within the NHU.

In our initial memorandum, we concluded, contrary to the Region's recommendation, that the handbillers' access

¹ See Yale University and Yale New Haven Hospital, Cases 34-CA-10404, et al., Advice Memorandum dated August 6, 2003. In that advice memorandum, we also authorized the Region to issue complaint, absent settlement, alleging that the Hospital unlawfully denied access to and arrested an onsite University employee who was handbilling on the same Hospital property.

² NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956).

³ Republic Aviation v. NLRB, 324 U.S. 793 (1945).

rights were not governed by Gayfers Department Store.⁴ We reaffirm that conclusion. Thus, in Gayfers, the Board found that employees of a construction contractor, who worked regularly and exclusively on the property of a retail store, possessed Republic Aviation-based access rights to the store's exterior premises in order to communicate a Section 7 message to the store's customers.⁵ The handbillers in the instant case, however, did not work regularly and exclusively within the NHU. Rather, they were offsite University employees who were attempting to communicate a Section 7 message with onsite University employees. Accordingly, Gayfers is distinguishable.⁶

In our judgment, the facts of the instant case are closer to Scott Hudgens,⁷ where the Board found that Babcock & Wilcox governed the access rights of offsite employees to property other than their own employer's in order to communicate a Section 7 message to customers and onsite coworkers.⁸ Consistent with the General Counsel's Brief to the Board in New York New York, we applied the Hudgens/Jean Country three-part balancing test, rather than the Lechmere

⁴ 324 NLRB 1246 (1997).

⁵ The General Counsel has taken the position, as described in the brief to the Board on reconsideration dated May 16, 2003 in New York New York Hotel & Casino, 334 NLRB 762 (2001), remanded 313 F.3d 585 (D.C. Cir. 2002), that Gayfers was wrongly decided, and that Babcock & Wilcox should govern in such situations when the intended audience consists of members of the general public, rather than onsite coworkers. Compare Southern Services, 300 NLRB 1154, 1155 (1990), enfd. 954 F.2d 700 (11th Cir. 1992) (intended audience was onsite coworkers).

⁶ The instant case is also distinguishable from Hillhaven Highland House, 336 NLRB 646, 648 (2001), enfd. 344 F.3d 523 (6th Cir. 2003), where the Board found that offsite employees possess Republic Aviation-based access rights to other property owned by their own employer in order to communicate with their onsite coworkers.

⁷ 230 NLRB 414 (1977).

⁸ See also Peddie Buildings, 203 NLRB 265, 266 (1973), enf. denied 498 F.2d 43 (3d Cir. 1974). In both Hudgens and Peddie, the Board applied a balancing test to determine whether the offsite employees were entitled to access the property at issue. See generally Jean Country, 291 NLRB 11 (1988).

standard regarding the access rights of total strangers,⁹ to determine whether the handbillers were privileged to handbill on Hospital property.

II. None of the Charging Parties' contentions alter our conclusion that, applying the Hudgens/Jean Country balancing test, the offsite University employee handbillers were not privileged to access Hospital-owned NHU entrances.

The Charging Parties requested that we reconsider our application of the Hudgens/Jean Country balancing test in this case. Specifically, the Charging Parties contend that: (1) the general public's access to the NHU is not restricted, and that a broad public enters the NHU each day; (2) the work undertaken in the NHU is not particularly sensitive, and is not accomplished through the use of high-tech and expensive equipment, relative to other University and/or Hospital facilities; (3) University and/or Hospital employees are not readily identifiable to the handbillers; (4) Local 34 (the charging party representing University employees who work within the NHU) does not, under the circumstances, have reasonable alternative access to those employees. We have taken those contentions into consideration in applying the balancing test, and reaffirm our conclusions.

A. Public access to the NHU.

Members of the general public may enter the NHU on a daily basis, but it is a limited subset of the general public: patients, ostensibly with appointments. It does not appear that the Hospital extends an open invitation to the public generally to use the NHU property, as would a shopping mall or a stand-alone retail establishment. In addition, the Hospital police officers who monitored the entrances to the NHU in the instant case possessed constable authority, including arrest power. Furthermore, individuals who work within the NHU possess identification cards. In this sense, the general public enjoys what could be described as limited or restricted access to the NHU.

B. The NHU's function.

The NHU is used for medical research in fields such as immunobiology, as well as outpatient diagnosis and treatment for patients with cancer and other medical conditions. The Hospital must be able to maintain the appropriate atmosphere for such research and medical

⁹ Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

diagnosis/treatment to succeed. Moreover, both types of activity, by their very nature, require high-tech, expensive equipment.¹⁰ It is immaterial whether other University or Hospital properties also contain high-tech, sensitive, state-of-the-art equipment. We are not assessing the relative strength of the Hospital's property interest in the NHU as compared to other nearby property, or other property owned by the Hospital. Rather, we are making a general assessment of the strength of the Hospital's property interest in the NHU specifically.

C. Local 34 members are readily identifiable.

Local 34 presumably knows the identities of its own dues-paying members, their work locations, and how to contact them. In this sense, Local 34's intended audience was "readily identifiable."

D. Alternative means of communication.

Local 34 had reasonably effective alternative means of communication with its intended audience which, as described above, is readily identifiable. Such alternative means would include phone calls, utilization of phone trees, e-mails, increased visits to interior work areas to which Local 34 had "unfettered access," and any number of combinations of the above.

Another reasonably effective alternative means of communication would be to simply station the handbillers on the public sidewalks 20 feet from the Hunter Building entrance and 60 feet from the Dana Clinic entrance. The charging parties contend that the handbillers could not necessarily distinguish between Local 34 members and patients or other persons approaching NHU entrances. However, it would not appear to be appreciably more difficult for the handbillers to make this distinction from the public sidewalk than from areas directly in front of the entrances, at least with regard to those Local 34 members wearing identification badges. Of course, Local 34 may also simply assign its handbilling tasks to off-duty onsite employees who would be privileged to station themselves on the Hospital's exterior property under Republic Aviation principles. Accordingly, our

¹⁰ The Hospital's website further substantiates this. See, e.g., <http://www.ynhh.org/cancer/treatment/radiation.html> (last modified Mar. 26, 2002) ("[The Hospital] has three state-of-the-art linear accelerators [machines that deliver external radiation to cancer patients] in the lowest level of the [Hunter] building").

"alternative means" analysis does not preclude Local 34 from communicating with its intended audience via handbilling in addition to the alternatives discussed above.

We are not persuaded that the urgent nature of Local 34's message - i.e. strike vote, strike deadline, emergency demonstrations - effectively precludes Local 34 from using alternative means of communication. Specifically, the charging parties claim that phone calls and visits take at least 10 minutes each, so that it would take 16 hours for Local 34 to communicate its protected message to even half of the 200 Local 34 members who work within the NHU. The charging parties claim that handbilling on Hospital property directly in front of the NHU entrances, on the other hand, permits the Union to reach its entire audience within 45 minutes, or less than 23 seconds per handbill recipient. In our view, if Local 34 is able to communicate its message while handbilling directly outside the NHU entrances in only 23 seconds, it should not take 10-plus minutes to communicate the same message using the alternative means described above. Granted, Local 34 might have to invest more time and resources using the alternative means of communication than otherwise. Indeed, Local 34's handbilling in the instant case very well may have been the most effective means of communication possible under the circumstances, except for perhaps equally effective handbilling from public sidewalks mere feet away. However, Local 34 was entitled only to a reasonable means of communication, not the most effective means.¹¹

E. Balancing Property Interests, Section 7 Interests, and Reasonably Effective Alternative Means.

Upon balancing the Hospital's property interest, the handbillers' Section 7 interests, and the reasonably effective alternative means of communication, we concluded that the Hospital lawfully denied access to and/or arrested the handbillers. The evidence of reasonably effective alternative means of communication was particularly significant to our conclusion, which we reaffirm.

¹¹ Hardee's Food Systems, Inc., 294 NLRB 642, 643-44 (1989), enfd. 904 F.2d 715 (D.C.Cir. 1990). Accord: NLRB v. Babcock & Wilcox Co., 351 U.S. at 112.

III. Access rights of graduate student researchers.

Finally, the Charging Parties request that we defer resolving the access rights of the two handbillers who were graduate student researchers pending the Board's reconsideration of New York University,¹² consistent with our decision in other Yale cases involving the employee status of University graduate student researchers and teaching assistants.¹³ We deny the Charging Parties' request as to the offsite graduate student researcher because she would not be entitled to handbill on Hospital property under the above analysis, even assuming she were a statutory employee. We also deny the Charging Parties' request as to the onsite graduate student researcher, because it would not effectuate the purposes and policies of the Act to defer resolving this aspect of the case. As noted above, at fn. 1, we have authorized the Region to issue complaint with regard to the onsite University employee handbiller. Therefore, deferral could implicate Jefferson Chemical¹⁴ issues if the onsite graduate student researcher were eventually deemed a statutory employee. Also, the remedy for denying access to the onsite University employee should be broad enough to cover future handbilling by onsite graduate student researchers generally, assuming, arguendo, that they are statutory employees.

Accordingly, the Region should dismiss the pertinent charge allegations, absent withdrawal.

B.J.K.

¹² 332 NLRB 1205 (2000).

¹³ Cases 34-CA-10317, 34-CA-10398, and 34-CA-10403.

¹⁴ Jefferson Chemical Co., 200 NLRB 992, 992 fn. 3 (1992) (Board imposed limitation on multiple litigation of issues that should have been presented in an initial proceeding).